2018 IL App (1st) 171302-U

No. 1-17-1302

Order filed June 20, 2018.

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

RYAN O'DONNELL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO AND ITS BOARD OF TRUSTEES and THE CITY OF CHICAGO, ILLINOIS,	)	No. 16 CH 12812
	)	
	)	
	)	The Honorable
	)	Thomas R. Allen,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago's determination that plaintiff police officer was no longer entitled to disability benefits was not clearly erroneous where evidence showed that his injury had healed and that the Chicago Police Department had light-duty jobs available which would accommodate his remaining physical limitations.

¶ 2 Plaintiff Ryan O'Donnell appeals from a decision rendered by defendant, the Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago (Board), in which the Board found that his disability resulting from an act of duty had ceased, stopped payment of his disability benefits, and directed him to return to the Chicago police department (Department) for assignment. Plaintiff contends that the Board's decision to terminate his benefit payments was clearly erroneous. For the following reasons, we affirm.

¶ 3 In 2006, plaintiff was injured while training at the police academy and was subsequently awarded a line of duty pension. On October 26, 2015 and August 25, 2016, the Board conducted hearings to determine plaintiff's continued eligibility. The Board ultimately determined that although plaintiff could not return to unrestricted police work, light-duty positions were available within the Department which could accommodate his physical limitations. The following facts are taken from the evidence of record presented at the Board's hearings to determine whether plaintiff remained disabled.

¶ 4 Plaintiff testified that he was 35 years-old and that he sustained a right clavicle fracture on June 12, 2006, during the third or fourth week of his training at the Chicago police academy. After receiving medical treatment from a different doctor for a short period of time, plaintiff was referred to Dr. Gitelis, whom he had seen several times a year since the incident. Plaintiff lived at home with his parents, and had been receiving a duty disability benefit for eight and a half years. He had not "held any job whatsoever" during that time period, and had not attempted to go back to work for the Department. He continued to experience constant pain in his neck and arm, and numbness in two of the fingers of his right hand as result of his injury. He remained unable to completely raise his right arm without experiencing pain, and was taking an opioid painkiller three to four times per week. He had not had surgery on his clavicle but was still considering the

prospect of surgery. When asked why he had not undergone surgery, he testified that he was told that the surgery "would possibly only fix 50 percent" of his pain and that he was concerned that the surgery "could make it worse."

¶ 5 At the time of his injury, plaintiff had been engaged in crawling, tumbling, running, boxing, and "all sorts of physical activity in the gym." However, he was currently unable to complete these activities or bench press 130 pounds. Upon questioning from the Board's attorney, plaintiff testified that he "spend[s] a lot of time in bed" and that the pain from his injury prevents him from sleeping more than a few hours a night. He was able to drive a car, and had driven to Tennessee and Starved Rock State Park with his girlfriend's assistance. He did not spend all day in bed during his vacations and was able to "get around" by taking medication. He was also able to dress himself, tie a necktie, and comb his hair, but could only type at a computer for a certain period of time before he experienced numbness in his right arm, at which time he would need to stop and lie down.

¶ 6 Doctor Michael Gitelis, who had been treating plaintiff since 2006, testified that, in his experience of treating hundreds to thousands of clavicle fractures, a very small percentage of clavicle fractures had "lasted nine years and have been disabling." Plaintiff's clavicle fracture had completely healed in 2008, but he continued to experience pain, numbness, and tingling in his right arm. The healing of the fracture had produced "an exuberant amount" of new bone formation, which Gitelis characterized as a rare occurrence. He believed that plaintiff had adhesive capsulitis, or a "frozen shoulder," tendinitis of the rotator cuff, and was beginning to develop arthritis in the acromioclavicular joint. Plaintiff exhibited a limited range of motion in his right arm, including reduced forward flexion, abduction, and internal rotation, but had gained an increased range of motion after he had had "gone through every protocol in terms of physical

therapy that is usually used for this type of problem." Gitelis had recommended surgery to plaintiff, as it was his opinion that surgery would improve his range of motion and decrease the amount of pain he experienced, but explained that he could not guarantee that surgery would be successful. He opined that plaintiff would be able to work in an office-type setting answering phones and writing papers, but that he did not have enough information about the physical demands of the police academy to determine if plaintiff could complete his training.

¶ 7 Joseph J. Castronovo, a physical therapist for the Illinois Bone and Joint Institute, testified that he conducted a functional capacity exam (FCE) with plaintiff in September of 2015, and noted that plaintiff had consistent weakness in his right upper extremity and significant weakness in his dominant hand grip. Plaintiff exhibited a decreased range of motion in his right shoulder, and Castronovo commented that, although "the bone might have healed on the X-ray," upon visual and physical inspection he determined that plaintiff's "clavicle kind of caved in." The typical demand level of a police officer, as stated in the Dictionary of Occupational Titles, was a medium demand level, but plaintiff was only capable of a sedentary or light physical demand level. Castronovo's report indicated that plaintiff could "safely perform a leg/floor lift of twenty pounds, a shoulder lift of ten pounds, an overhead lift of five pounds, a thirty-foot carry of fifteen pounds on an occasional basis." Castronovo had no objection to plaintiff returning to work if accommodations could be made for his decreased abilities. Plaintiff was functionally capable of completing office-type work, including carrying paper, answering a phone, and writing reports. Plaintiff "could likely pull the trigger" of a gun but "could barely" hold a four-pound weight out in front of him for a period of "no longer than ten seconds at a time." Castronovo was unsure whether plaintiff could handle the recoil from shooting

¶ 8 Dr. Peter Hoepfner, an orthopedic surgeon for the Illinois Bone and Joint Institute, testified that he conducted an independent medical evaluation of plaintiff on October 16, 2014, and concluded that he was "capable of productive work" though his limited abilities "may result in a recommendation for physical restrictions and the ability to participate in police work under light duty." He examined plaintiff again on July 28, 2016, and found that he had "persistent pain as well as paraesthesias affecting his right upper extremity" but that he had full motion of his right elbow, wrist, and hand. Upon questioning by plaintiff's counsel, Hoepfner stated that his objective testing suggested that plaintiff "may have thoracic outlet syndrome" and that the treatment for thoracic outlet syndrome is a surgery that requires the removal of a rib bone. Although plaintiff could not perform the duties of a full-duty officer, Hoepfner believed that "he would capable of being a productive employee to some extent where he's not required to exert extreme physical effort" and that "he certainly has the ability to use his arm in various daily normal tasks and be a productive employee." Plaintiff could perform clerical functions within the department, such as answering phones and writing reports.

¶ 9 Donald J. O'Neill, the director of the human resources division of the Chicago police department, testified that he was not familiar with plaintiff's medical file but stated that limited duty positions, such as answering phones and taking reports in a secured building, existed within the department. The Department has routinely made reasonable accommodations, pursuant to the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 *et seq.* (2016)), for officers returning to work, but the human resources division of the Department requires notification from the Board that an officer's disability payments are scheduled to be terminated before the officer can begin the reinstatement process. After the human resources division receives such a letter, plaintiff would need to return to the department with a valid driver's license and a Firearm

Owners Identification (FOID) card, and then he would undergo a physical exam "to see if he's able to perform the functions of a limited duty police officer." Plaintiff could then return to the police academy to complete his training. O'Neill stated that "[i]f there's no prospect of him ever being able to complete the academy work, that would have to be evaluated," but that plaintiff's inability to complete training at the academy would not prohibit him from working for the department in a limited-duty position. Upon questioning by plaintiff's counsel, O'Neill testified that plaintiff would remain a probationary police officer if he was unable to complete his academy training.

¶ 10 On August 25, 2016, the Board decided to terminate plaintiff's disability benefits on September 30, 2016, and directed him to return to the department for assignment. The Board found that plaintiff was not a credible witness, noting his "expressions when responding to questions asked," and the contrast between his initial complaints of not being able to do anything but sleep and lie in bed "and his later admissions concerning his ability to drive a car for several hours when taking trips." Plaintiff did not have an anatomical defect which would prevent him from attempting to qualify with his weapon, but was not capable of returning to unrestricted police work "and is disabled from such." Based on the testimony of Dr. Hoepfner, Dr. Gitelis, and physical therapist Castronovo, plaintiff would be capable of returning to the Chicago police department in a light-duty office setting. The Board concluded that: (1) there were limited duty positions available in the police service which plaintiff could perform; (2) there was no medical reason which would prevent plaintiff from attempting to qualify at the gun range; and (3) "in light of the testimony of O'Neill, a return to work in regard to an officer in receipt of duty disability cannot be commenced without the Board terminating the current benefit."

¶ 11 On September 28, 2016, plaintiff filed a complaint seeking a temporary restraining order prohibiting the Board from terminating his pension benefits. On September 29, 2016, the circuit court granted the plaintiff's oral motion to amend his complaint, and ordered that the order of the Board was stayed until the resolution of plaintiff's appeal of its decision. In an amended complaint dated October 6, 2016, plaintiff sought the circuit court's review of the Board's decision pursuant to the Administrative Review Law (Review Law) (735 ILCS 5/3-101 *et seq.* (West 2016)).

¶ 12 On February 6, 2017, the circuit court remanded the case to the Board to consider the contents of certain correspondence between the Department's medical services section and its human resources division, a physical examination report created by U.S. Health Works Medical Group, and the report of Doctor James Pride, all of which were created after the Board made its initial decision. The circuit court instructed the Board to issue a new order addressing its decision after considering the new evidence. The October 12, 2016 correspondence from the medical services section stated that plaintiff had been provided with a physical examination on September 16, 2016, and that he was qualified to return to limited duty status. The U.S. Health Works examination report from September 16, 2016 concluded that plaintiff was "[m]edically acceptable for the position offered, except that a condition exists which limits work as follows: no use of the right arm/shoulder." The November 17, 2016 report from Dr. Pride stated that he did not believe that plaintiff was "capable of any occupation that requires him to use his upper right extremity."

¶ 13 On March 28, 2017, the Board issued a written order reaffirming its pervious order and terminating plaintiff's benefits, finding that "Dr. Pride's report [did] not, in any way, address the Board's finding that [plaintiff] could perform in a limited duty, office-type position with the

[Department]" and that "Dr. Pride's silence in regard to [plaintiff's] ability to return to a limited duty position confirm[ed] the Board's prior Order and the October 12, 2016 *** Medical Services Section correspondence." It also found that "[plaintiff's] failure to return to duty is not reflective of his ability to perform in a light-duty position but only reflects his failure to complete the return to duty process." On April 26, 2017, the circuit court denied plaintiff's petition for administrative review and affirmed the Board's decision. This appeal followed.

¶ 14 The Illinois Pension Code mandates that the review of final administrative decisions of the retirement Board are governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2016)). 40 ILCS 5/5-228 (West 2016). When a party appeals the circuit court's decision on a complaint for review pursuant to the Review Law, this court reviews the decision of the administrative agency as opposed to the decision of the circuit court. *White v. Retirement Board of Policemen's Annuity & Benefit Fund*, 2014 IL App (1st) 132315, ¶ 23. When reviewing the Board's decision, " '[t]he applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law.' " *Howe v. Retirement Board of Firemen's Annuity and Benefit Fund of Chicago*, 2015 IL App (1st) 141350, ¶ 43 (quoting *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board State Panel*, 216 Ill. 2d 569, 577 (2005)).

¶ 15 "The findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct" (735 ILCS 5/3-110 (West 2016)) and we will not disturb them unless we find that they are against the manifest weight of the evidence. *Payne v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 2012 IL App (1st) 112435, ¶ 42. " 'An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.' " *Marconi v. Chicago Heights Police Pension Board*, 225

Ill. 2d 497, 534 (2006) (citing *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992)). We review questions of law *de novo*, and mixed questions of law and fact under the clearly erroneous standard. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 505 (2007). A mixed question of law and fact is typically one in which the historical facts are not in dispute and the issue is whether the established facts satisfy the statutory standard. *My Baps Construction Corp. v. City of Chicago*, 2017 IL App (1st) 161020, ¶ 115. "An administrative decision is clearly erroneous where the reviewing court is left with the definite and firm conviction that a mistake has been made." *Kouzoukas v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, 234 Ill. 2d 446, 464 (2009). "Under any standard of review, a plaintiff in an administrative proceeding bears the burden of proof, and relief will be denied if he or she fails to sustain that burden." *Wade*, 226 Ill. 2d at 505; see also *Peacock v. Board of Trustees of the Police Pension Fund*, 395 Ill. App. 3d 644, 652 (2009) ("The claimant bears the burden of proving his or her entitlement to continued disability benefits").

¶ 16 On appeal, the parties do not dispute that plaintiff had been injured in the line of duty or that he is unable to return to work a full-duty police officer. Rather, the plaintiff contends that the Board's decision that he was no longer disabled for the purposes of the Pension Code was clearly erroneous. See *Wilfert v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 318 Ill. App. 3d 507, 514 (2000) (reviewing a pension board's termination of benefits under the clearly erroneous standard, because its decision "was factual in part, because it involved considering whether the facts supported a ruling that [plaintiff's] disability had ceased," and presented a question of law, because " 'disability' is a statutory term *** which is subject to legal interpretation"); But see *Peacock*, 395 Ill. App. 3d at 652 (question of whether an officer is entitled to disability benefits is a question of fact, and is reviewed under the manifest weight of

the evidence standard.) Plaintiff also contends that certain factual findings and credibility determinations made by the Board were against the manifest weight of the evidence.

¶ 17 The Illinois Pension Code defines a disability as "[a] condition of physical or mental incapacity to perform *any* assigned duty or duties in the police service." (Emphasis added.) 40 ILCS 5/5-102 (West 2016). A police officer who becomes disabled as the result of an injury incurred in the performance of an act of duty is entitled to a duty disability benefit equal to 75% of his salary. 40 ILCS 5/5-154 (West 2016). However, "[a] police officer's entitlement to disability benefits is contingent on his continued disability, and the Board may revoke those benefits if he has recovered from the disability." *Peacock*, 395 Ill. App. 3d at 652. The Pension Code states that "[a] disabled policeman who receives a duty, occupational disease, or ordinary disability benefit shall be examined at least once a year by one or more physicians appointed by the board. When the disability ceases, the board shall discontinue payment of the benefit, and the policeman shall be returned to active service." 40 ILCS 5/5-156 (West 2016).

¶ 18 Here, we find that the Board's determination that plaintiff was no longer disabled was not clearly erroneous. As we noted above, it was plaintiff's burden to prove his entitlement to continued disability benefits. See *Wade*, 226 Ill. 2d at 505; *Peacock*, 395 Ill. App. 3d at 652. A disability as defined by the Pension Code is a condition of physical incapacity to perform any assigned duty in the police service. 40 ILCS 5/5-115 (West 2016). While Dr. Gitelis, Dr. Hoepfner, and physical therapist Castronovo testified that plaintiff exhibited limited mobility and continued to feel pain as a result of his original clavicle fracture, all three testified that plaintiff would be capable of performing office duties such as answering phones and filing reports. O'Neill, the director of the Chicago police department human resources division, testified that limited duty positions, such as answering phones and taking reports in a secured building, existed

within the department and that Chicago police department makes reasonable ADA accommodations as required by officers returning to work. Further, during the pendency of the circuit court's administrative review, the medical services section of the Chicago police department provided plaintiff with a physical examination. The examination report, dated September 16, 2016, stated that plaintiff was "[m]edically acceptable for the position offered, except that a condition exists which limits work as follows: no use of the right arm/shoulder." Based on this report, the medical services section determined, in a letter dated October 12, 2016, that plaintiff was qualified to return to limited duty status. In light of this evidence, the Board's determination that plaintiff was no longer disabled, because there were duties within the police service which he could perform despite his remaining incapacities, was not clearly erroneous.

¶ 19 Plaintiff argues, citing *Kouzoukas v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, 234 Ill. 2d 446, 469 (2009), and *Terrano v. Ret. Bd. Of Policemen's Annuity & Benefit Fund of City of Chicago*, 315 Ill. App. 3d 270, 275 (2000), that his disability payments could not be terminated because there was no evidence that the Department actually offered him a light-duty position. The question of whether a light-duty position was available or offered to plaintiff presents a question of fact. See *Kouzoukas,* 234 Ill. 2d at 471 ("Thus, the manifest weight of the evidence shows that Kouzoukas carried her burden of proving that she was disabled, that is, that she had a physical condition which made her incapable of performing any assigned duty and that no position within her limitations was offered to her"); *Terrano,* 315 Ill. App. 3d at 275 ("there is no evidence in the record before us that a position existed within the Department which could be performed by a person with the plaintiff's physical limitations or that any limited duty position was offered to the plaintiff").

¶ 20 Here, we find that the Board's finding that a limited-duty position in the police service was available to plaintiff was not against the manifest weight of the evidence. As noted above, O'Neill testified that limited duty positions, such as answering phones and taking reports in a secured building, existed within the Department and that the Department routinely makes reasonable ADA accommodations as required by officers returning to work. Moreover, the medical services section's correspondence informing the Department's human resources division that plaintiff was cleared for reassignment and informing plaintiff that he should meet with his doctor within two weeks, along with the U.S. Health Works report stating that plaintiff was "[m]edically acceptable for the position offered" with special conditions for his right arm, suggest that a light-duty position within the Department was available to or offered to plaintiff. Based on this evidence, the Board's finding that there were light-duty positions available to plaintiff was not against the manifest weight of the evidence.

¶ 21 Plaintiff further contends that, in the absence of any specific job description listing the "specific nature" of a light-duty position, it was not possible for the medical professionals to opine that plaintiff was capable of doing office work or for the Board to determine that he was capable of performing the a light-duty position within the department. He also contends, citing *Danko v. Board of Trustees of City of the Harvey Pension Board*, 240 Ill. App. 3d 633, 644 (1992), that the record "is void as to any real evidence that Chicago Police Department can make special accommodations" for him and that any light-duty job the department made available to him would be a "hoax" and created "specifically to disadvantage [his] entitlement to pension." We disagree. In *Danko*, there was evidence in the record that the Harvey police department had never assigned an officer to permanent light-duty and that the Harvey police department created a light-duty position specifically to deny pension benefits to the plaintiff. Here, however, O'Neill

testified that the Department routinely returned injured officers to light-duty positions such as answering phones and typing police reports. Moreover, upon questioning by the Board's attorney, three medical witnesses, including Dr. Gitelis, who had been treating plaintiff since 2006, opined that plaintiff was capable of working in a position which required him to answer phones and write reports. Even with a lack of a specific job description, we cannot say that the Board's determination that a job was available for plaintiff was against the manifest weight of the evidence.

¶ 22 In further arguing that the Board's decision was not supported by the record, plaintiff also contends that the Board's determination that he was not a credible witness was against the manifest weight of the evidence. His contention is based, in part, on his assertion that the Board found that his "testimony regarding his pain must be false." However, the Board made no such finding. The Board found plaintiff to not be credible based on "his expressions when responding to questions asked" and its opinion that plaintiff's testimony regarding his abilities vacillated upon questioning. As noted above, an administrative agency's factual conclusions are reviewed under the manifest weight of the evidence standard, and we will only reverse them only if the opposite conclusion is clearly evident from the evidence. See *Marconi*, 225 Ill. 2d at 534 (2006). Here, we find that it is not.

¶ 23 Plaintiff also takes issue with the fact that he could be relegated to the position of probationary police officer and be fired for any reason, including a situation in which he would be unable, because of his functional limitations, to assist other officers or the general public during an emergency. He also speculates that he could be denied work by Chicago police department because of his injury and be stuck in a state of "limbo" where he is too healthy to

receive a disability pension but too injured to work. Insofar as these situations could possibly arise, the legal issues they would present are not ripe for our consideration. See *Morr-Fritz, Inc., v. Blagojevich*, 231 Ill. 2d 474, 490 (2008) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)) ("The basic rationale of the ripeness doctrine is to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' ") Moreover, we lack jurisdiction to consider moot or abstract questions and will not address plaintiff's abstract arguments. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523 (2001).

¶ 24 Finally, we have considered various other abstract policy arguments scattered throughout plaintiff's opening and reply briefs in which plaintiff calls into question his ability to complete the police academy, the Board's intentions behind terminating his benefits, and the reasons why the Board did not attempt to evaluate his continued eligibility for benefits before 2015. However, we find that these arguments are not relevant to the ultimate question presented by this appeal. See *Id*. That question is whether the Board's determination that plaintiff was no longer disabled for the purposes of the Illinois Pension Code was clearly erroneous. After viewing the record as a whole, we have determined that it was not.

¶ 25 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.